Beverly Enterprises d/b/a Hillview Convalescent Center *and* American Federation of State, County and Municipal Employees, District Council 83, AFL-CIO. Case 6-CA-15329

May 11, 1983

ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On October 18, 1982, a hearing was opened before Administrative Law Judge Joel A. Harmatz. Prior to the presentation of any evidence on the merits of the case, Respondent moved for dismissal of the complaint on the grounds that the Charging Party's attorney had violated Section 102.120 of the National Labor Relations Board Rules and Regulations which prohibits any person who has been an employee of the Board in Washington from engaging in practice before the Board "in any respect or in any capacity with any case or proceeding pending before the Board or *any Regional Offices* during the time of his employment with the Board [emphasis supplied]." In the alternative, Respondent moved for disqualification of the law firm. The Administrative Law Judge denied the motion to dismiss the complaint, but granted the motion to disqualify the law firm.

On October 21, 1982, the law firm representing the Charging Party filed a request for special permission to appeal the Administrative Law Judge's ruling disqualifying the entire firm. On October 26, 1982, Respondent filed a statement in opposition to the appeal.[1]

The facts appear to be undisputed. The Charging Party's counsel, Lee W. Jackson, Jr., was employed as an attorney in the Division of Enforcement Litigation until April 4, 1982. After leaving the Board's employ, Jackson joined the law firm of Kirschner, Walters, Willig, Weinberg & Dempsey in Philadelphia. The charge in this case was filed on February 26, 1982, and, at all times before April 4, 1982, was processed exclusively in the Regional Office. Notwithstanding the clear prohibition in Section 102.120, attorney Jackson concededly became involved in this case after joining the law firm and remained involved until on or about August 18, 1982, when, after being advised by the Regional Office of the apparent violation, Jackson withdrew his notice of appearance.

In granting Respondent's motion to disqualify the entire firm, the Administrative Law Judge relied upon the following grounds: (1) there was no showing that Jackson had actually participated in the case while employed with the Board in Washington; (2) there was no showing of prejudice to Respondent, since there was no evidence that Jackson had actual knowledge of the case which he gained while still employed by the Board; (3) Section 102.120 had apparently been violated, given Jackson's participation in the case from April 1982 through August 18, 1982; (4) the absence of precedent in reported decisions regarding enforcement of Section 102.120.

The Charging Party contends that there is "no allegation of actual impropriety other than the apparent violation of the Board's Rules and Regulations." Although conceding the Board is justifiably concerned with avoiding conflicts of interest on the part of former employees, the Charging Party urges the Board to take cognizance of the large number of employees stationed in Washington, and the fact that there are "certain established separations between the Board Members and their staffs, and the General Counsel and the General Counsel's staff." The Charging Party also argues that, as an attorney in Enforcement Litigation, Jackson "spent his time in Washington researching, writing and arguing appeals in the Appellate Courts Branch." The Charging Party asserts that any alleged violation of Section 102.120 must be scrutinized "for its substance and not its form" and that, when viewed in light of the undisputed facts, the apparent violation of the rule in this case is "inconsequential and not in violation of the spirit of the rule." In this regard, the Charging Party contends that at no time during Jackson's tenure with the Board was this case referred to Washington, that while employed at the law firm Jackson participated in the case principally during its investigatory stage, and that even assuming *arguendo* he possessed unknown information that might have been useful in advocating the case before the Region, "that advantage would have ended upon the issuance of complaint and the Region's assumption of an adversary role against the Employer." Finally, the Charging Party argues that the Administrative Law Judge's ruling serves to deprive the Charging Party of the right to use counsel of its choice. In any event, the Charging Party contends that, since no penalty is prescribed by the rule in question, the remedy selected is discretionary and should be equitable in nature.

In opposing the appeal, Respondent argues that the following factors support the Administrative Law Judge's ruling: (1) Jackson requested permission to withdraw only after being advised by the Regional Director he could not participate in any

[1] On November 3, 1982, the Board (Member Jenkins dissenting) issued a telegraph order (with written decision to follow), granting the Charging Party's appeal and concluding that disqualification of the law firm was not warranted. The hearing thereupon resumed and was closed on March 30, 1983, by the Administrative Law Judge's order.

capacity; (2) the law firm took no steps to disassociate Jackson from this case in order to prevent a violation of Rule 102.120; (3) ignorance of the rule should not permit the law firm to profit; (4) the Board's broad rule is designed to avoid even the appearance of impropriety; (5) the only way to prevent the Union from deriving benefit from violation of the rule is to disqualify both Jackson and the firm; (6) if the law firm is not disqualified, the Board will provide no real remedy to the violation of its rule; (7) no real hardship will be visited on the firm because the attorney who succeeded Jackson allegedly admitted that he had not previously become involved except in a peripheral manner.

Respondent contends that Section 102.120 is designed to avoid the appearance of impropriety and that any attorney employed by the Board in Washington is prohibited from using any "expertise and information in connection with any case pending while the individual worked at the Board." Respondent argues that, while employed as an attorney in the Division of Enforcement Litigation, Jackson "was in a position to learn the rationale for the issuance of complaint and similar pending cases as set forth in both Advice and Appeals memorandums."

Having duly considered the matter, and the arguments advanced by the Charging Party in its appeal, and Respondent in its opposition, the Board has decided to grant the request for special permission to appeal and, on appeal, to reverse the ruling of the Administrative Law Judge.

The Board has without exception strictly applied the provisions of Section 102.120 so that an employee in the Board's Washington Office who leaves the Board is precluded from participation at any time in any case pending anywhere in the Agency prior to the employee's departure.

Since it is undisputed that attorney Jackson's participation in this case violated Section 102.120 of the Rules and Regulations, the sole issue presented is the propriety of the Administrative Law Judge's remedy for the violation; i.e., disqualification of the entire firm.[2]

In granting Respondent's motion to disqualify the entire law firm, the Administrative Law Judge relied, *inter alia*, on the absence of precedent. However, in *Alumbaugh Coal Corp.*, 247 NLRB 895 (1980), the Board rejected the respondent's contention that participation of a former Regional Office employee on behalf of the charging party required dismissal of the complaint.[3] The Administrative Law Judge denied the respondent's motion on the grounds that Zera's actions were minimal, "and had not so tainted the hearing as to deny the Respondent due process of law . . . ." He further concluded that "the hearing was not the proper forum to consider any disciplinary proceedings." In affirming the Administrative Law Judge's ruling, the Board noted Zera's minimal participation, as well as the absence of any evidence that Zera's conduct had in any way prejudiced the respondent.

Although attorney Jackson's participation in this case was significantly greater than Zera's minimal participation in *Alumbaugh*, we believe that *Alumbaugh* is controlling here. In so concluding, we note the absence of any evidence that Jackson's withdrawal from participation in this case is incomplete. Further, there is no evidence that Jackson had any knowledge of the case until after he left the Board and joined the law firm. Although Respondent suggests that through his employment in Washington, Jackson was privy to Advice and Appeals memoranda, we have been administratively advised that this particular case was *not* the subject of either an Advice or an Appeals submission.

The Board has not had prior occasion to address the scope of potential remedies for violation of Section 102.120 of our Rules. Certainly, were the attorney involved still participating in the case, we would order that he terminate such participation. In this case, that has already been accomplished. A law firm, in our view, bears some responsibility to police the activities of its partners or associates who have recently been employed by the Board. Accordingly, if there were evidence that some material advantage had accrued to the party represented by an attorney in violation of Rule 102.120, we would disqualify the law firm involved to assure that no prejudice inured to the other party or parties. In the absence of such a showing in this case, we find the Administrative Law Judge's determination to disqualify the firm of Kirschner, Walters, Willig, Weinberg & Dempsey to be inappropriate, and shall reverse that portion of his order. Responsibility for violating Rule 102.120 falls primarily on the attorney involved, and in the absence of a showing of prejudice or some other circumstances justifying disqualification of the firm,

[2] Sec. 102.120 is silent with respect to what, if any, action the Board may take if the rule is violated. Further, this section treats only with the employee who has departed and makes no reference to participation by the firm which the employee joins.

[3] In *Alumbaugh*, above, attorney Ronald Zera had been employed in the Pittsburgh Regional Office at the time the unfair labor practice charge was filed on September 13, 1977. Zera subsequently left the Board and became an associate of Kenneth J. Yablonski, counsel for the United Mine Workers, the charging party. Zera did not participate in the hearing before the Administrative Law Judge and his participation in the case was limited to a postelection meeting with two employees to discuss the facts of the case. Thereafter, Zera transmitted a letter to the Regional Office withdrawing certain objections.

we shall limit our orders for violations of the rule to run against the attorney individually.

IT IS HEREBY ORDERED that the Charging Party's request for special permission to appeal the Administrative Law Judge's ruling is granted. His ruling disqualifying the law firm from representing the Charging Party is reversed and this matter remanded to the Administrative Law Judge for the purpose of receiving evidence on the issues raised by the complaint.

MEMBER JENKINS, dissenting:

I would affirm the ruling of the Administrative Law Judge. The arguments for disqualifying the firm, as recounted by the majority, are persuasive. In particular, our rule is designed to avoid, not only actual impropriety, but the appearance of impropriety. That is, it is not enough to do justice, but justice must be seen to be done.

This principle eliminates the major ground on which the majority relies, that there is no evidence that Jackson's withdrawal is less than complete, or that he had any knowledge of the case while he was at the Board. It is precisely because these matters are almost impossible to ascertain that our rule was adopted. The majority's action thus impairs the rule at its very foundation.

Alumbaugh Coal,[4] relied on by the majority, has no bearing here; as the majority acknowledges, the attorney's participation is far greater here, and in any event no one is here proposing to punish the innocent charging party by dismissing the complaint, as was the case in *Alumbaugh*.

[4] *Alumbaugh Coal Corporation*, 247 NLRB 895 (1980).